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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BARBARA JEAN LAGNO,
CONSTANTINE N. K. OSIAKWAN, GREGORY JOHN STURGIS,
MARIAN JERZY ZARNOWSKI, and ADONNY WILLIAM RAPHAEL

Appeal 2009-1030
Application 10/675,067
Technology Center 2600

Decided:¹ April 20, 2009

Before JOSEPH F. RUGGIERO, JOHN A. JEFFERY,
and KARL D. EASTHOM, *Administrative Patent Judges*.

RUGGIERO, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the Final Rejection of claims 1-39, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Rather than reiterate the arguments of Appellants and the Examiner, reference is made to the Brief filed August 22, 2007(revised, October 2, 2007) and Answer mailed October 31, 2007 for the respective details. Only those arguments actually made by Appellants have been considered in this decision. Arguments which Appellants could have made but chose not to make in the Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellants' Invention

Appellants' invention relates to determining the ability of one or more wireless terminals in a network to communicate with a specific wireless terminal, such as an access point, with a particular level of service. The determination is based upon measurements of the electromagnetic signals transmitted by the wireless terminals in the network. The network informs the wireless terminal in need of communicating with the wireless terminal access point as to where to expect performance at the particular level of service required. (*See generally* Spec. ¶¶ [0010]-[0012]).

Claim 1 is illustrative of the invention and reads as follows:

1. A method comprising:
determining that a first wireless terminal at a location can
communicate with a second wireless terminal with a level of service; and
transmitting to a third wireless terminal an indication that said third
wireless terminal should be able to communicate with said second wireless
terminal with said level of service at said location.

The Examiner's Rejections

The Examiner's Answer cites the following references:

Crosbie	US 2002/0035699 A1	Mar. 21, 2002
Reddy	US 2004/0147254 A1	Jul. 29, 2004 (filed Sep. 29, 2003)
Lagno ²	US 2005/0070303 A1	Mar. 31, 2005 (filed Sep. 30, 2003)

Claims 1, 2, 6, 8-12, 16, 18-21, 25-27, 30-35, and 39 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crosbie in view of the admitted prior art (Appellants' published Lagno application).

Claims 3-5, 7, 13-15, 17, 22-24, 28, 29, and 36-38 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crosbie in view of the admitted prior art, and further in view of Reddy.

² The Lagno reference is the published application corresponding to the present application which is the subject of this appeal, Serial No. 10/675,067.

ISSUES

Under 35 U.S.C. § 103(a), with respect to appealed claims 1-39, would one of ordinary skill in the art at the time of the invention have found it obvious to combine Crosbie with the admitted prior art and additionally with Reddy to render the claimed invention unpatentable?

The pivotal issues before us are whether Appellants have demonstrated that the Examiner erred in

(i) interpreting the disclosure of the admitted prior art as teaching the transmission of an indication to a wireless terminal that it “should be able” to communicate with other wireless terminals at a level of service associated with a location; and

(ii) determining the obviousness to the skilled artisan of combining the wireless terminal communication teachings of Crosbie and the admitted prior art, as well as the further addition of the wireless terminal “hot spot” map display teachings of Reddy.

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence:

1. Crosbie discloses (¶ [0016]) determining if a first wireless terminal at a location can communicate with a second wireless terminal at a level of service based on the load levels of a first local area network compared with other local area networks.

2. Crosbie also discloses (¶¶ [0016] and [0035]) that a server directs a user of a wireless terminal to move to another area to provide a

better level of service if the service within the existing area is affected by congestion.

3. The admitted prior art (published Lagno application) discloses (¶ [0009] and Figure 2) that a second wireless terminal 201-1 can communicate with a first wireless terminal 101-4 with a level of service associated with the area location 102 in which both the first and second wireless terminals are located.

4. The admitted prior art (¶ [0011]) also describes the situation in which a third wireless terminal 201-2, located outside area location 102, is informed that the level of service is inadequate at that location and the user should move elsewhere.

5. Reddy discloses (Fig. 3 and ¶ [0044]) a wireless network in which a determination is made that a wireless terminal 404 which is located in a hot spot communication zone 403 can communicate with wireless terminal 406.

6. Further disclosed by Reddy (¶¶ [0045]-[0049] is the transmission of a map display wireless terminal 402 which indicates to the wireless terminal 402 that, if it moves into hot spot communication zone 403, it can establish communication with wireless terminal 406 at the level of service associated with the hot spot communication zone 403.

7. Reddy also provides (¶¶ [0050]-[0051]) for a quality of service rating for the various hot spot communication zones based on dynamic quality of service information including the threshold level determination of received signals.

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) (stating that 35 U.S.C. § 103 leads to three basic factual inquiries: the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the art). “[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). Furthermore,

“there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness” . . . [H]owever, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

ANALYSIS

I. THE REJECTION OF CLAIMS 1, 2, 6, 8-12, 16, 18-21, 25-27, 30-35, AND 39 BASED ON THE COMBINATION OF CROSBIE AND THE ADMITTED PRIOR ART.

Claims 1, 2, 6, 8, 26, 27, 30, and 31

With respect to the Examiner's obviousness rejection of independent method claim 1, and its apparatus counterpart independent claim 26, based on the combination of Crosbie and the admitted prior art, Appellants' arguments in response assert a failure by the Examiner to establish a *prima facie* case of obviousness since all of the claimed limitations are not taught or suggested by the applied prior art references. Appellants' arguments (Br. 14) initially focus on the alleged deficiency of the admitted prior art in disclosing the transmission of an indication to a third wireless terminal that such wireless terminal should be able to communicate with a second wireless terminal with a level of service at the location of a first wireless terminal.

We do not find Appellants' arguments to be persuasive in convincing us of any error in the Examiner's stated position. As also alluded to by the Examiner, we find Appellants' arguments to be merely general unsupported allegations that the applied prior art does not disclose the claimed invention with no specific arguments as to how the Examiner may have erred in the stated rejection. In particular, we find nothing in the language of claims 1 and 26 which requires, as generally alleged by Appellants, that an indication be transmitted to the third wireless terminal that it should move to a specific location in order to establish communication with a second wireless terminal at a particular level of service. Rather, claims 1 and 26 only require that an

indication be transmitted to the third wireless terminal that it “should be able” to communicate with the second wireless terminal at a level of service associated with the second wireless terminal. We find no error in the Examiner’s determination that the admitted prior art discloses this claimed feature.

As set forth by the Examiner (Ans. 4 and 13-15), the admitted prior art in Lagno (FF 3) discloses that a second wireless terminal 201-1 can communicate with a first wireless terminal 101-4 with a level of service associated with the area location 102 in which both the first and second wireless terminals are located. As further noted by the Examiner, the admitted prior art in Lango (FF 4) describes the situation in which a third wireless terminal 201-2, located outside area location 102, is informed that the level of service is inadequate at that location and the user should move elsewhere. We agree with the Examiner’s determination that, from the admitted prior art disclosure in Lagno, a skilled artisan would recognize that the user of the third wireless terminal 201-2 is being informed that, by moving elsewhere, the user “should be able” to communicate with the second wireless terminal at the level of service associated with the area location 102 occupied by the second wireless terminal.

We further find to be unpersuasive Appellants’ contention (Br. 15) that the Examiner has failed to provide any reasoning to support the proposed combination of Crosbie with the prior art. We find, Appellants’ arguments to the contrary notwithstanding, that the Examiner has provided an articulated line of reasoning (Ans. 4, 15, and 16) for the proposed combination with a rational underpinning to support the legal conclusion of obviousness in accordance with the *KSR* standard mentioned above.

We further find, although Appellants contend otherwise, that Crosbie, as well as the previously discussed admitted prior art, are both directed to environments in which users of wireless terminals are directed to move to other locations in order to improve the level of communication service. For example, Crosbie discloses (FF 1) that a server directs a user of a wireless terminal to move to another area to provide a better level of service if the service within the existing area is affected by congestion. Similarly, Crosbie also discloses (FF 2) that a server will reassign a wireless terminal to another base station access point if the level of service is affected by a user moving out of the range of a first base station access point.

For the above reasons, since it is our opinion that the Examiner has established a *prima facie* case of obviousness which has not been overcome by any convincing arguments from Appellants, the Examiner's 35 U.S.C. § 103(a) rejection of independent claims 1 and 26, as well as dependent claims 2, 6, 8, 27, 30, and 31 not separately argued by Appellants, is sustained.

Claims 9-12, 16, 18-21, 25, 32-35, and 39

The Examiner's obviousness rejection of independent claims 9, 18, and 32, as well as the rejection of dependent claims 10-12, 16, 19-21, 25, 33-35, and 39 not separately argued, is sustained as well. The language of independent claims 9, 18, and 32 differs slightly from previously discussed independent claims 1 and 26 in that they include a limitation directed to the transmission of an indication that a wireless terminal should be able to communicate if a received electromagnetic signal exceeds a threshold.

As with the previous arguments with respect to independent claims 1 and 26, Appellants generally allege (Br. 15-17) that the combination of Crosbie and the admitted prior art does not teach or suggest the claimed invention, but have not argued with any particularity how and where the Examiner erred in the stated rejection. We refer to our previous discussion with respect to Crosbie and, in particular, the admitted prior art in Lagno, in which we found no error in the Examiner's determination (Ans. 5, 7, 10, and 17-19) that the admitted prior art discloses that an indication is provided to a wireless terminal user that the user "should be able" to communicate if they move elsewhere than their present location. We agree with the Examiner (Ans. 5, 7, 10, and 17-19) that a skilled artisan would recognize from this disclosure that, in order for communication to be effected, the level of service characteristic associated with a received signal would necessarily have to be above a threshold level.

II. THE REJECTION OF CLAIMS 3-5, 7, 13-15, 17, 22-24, 28, 29, AND 36-38 BASED ON THE COMBINATION OF CROSBIE, THE ADMITTED PRIOR ART, AND REDDY.

This rejection is sustained as well. In addressing the requirements of the rejected claims, which are ultimately dependent on the previously discussed independent claims 1, 9, 18, 26, and 32, the Examiner has applied the communication "hot spot" map display teachings of Reddy to the combined teachings of Crosbie and the admitted prior art. Appellants have made no separate arguments for the patentability of these claims, but instead have relied upon the previously asserted arguments made with respect to the

rejection of claims 1, 9, 18, 26, and 32 based on Crosbie and the admitted prior art, which arguments we found to be unpersuasive as discussed *supra*.

We also make the observation that our review of Reddy reveals that Reddy discloses (FF 5) a wireless network in which a determination is made that a first wireless terminal 404 which is located in a hot spot communication zone 403 can communicate with a second wireless terminal 406. Further disclosed by Reddy (FF 6) is the transmission of a map display to third wireless terminal 402 which indicates to the third wireless terminal 402 that, if it moves into hot spot communication zone 403, it "should be able" to communicate with second wireless terminal 406 at the level of service associated with the hot spot communication zone 403. Reddy also provides (FF 7) for a quality of service rating for the various hot spot communication zones based on dynamic quality of service information including the threshold level determination of received signals.

With the above discussion in mind, it is apparent that, although the Examiner has relied upon Crosbie and the admitted prior art for the teachings of providing indications to a wireless terminal that it should move to a different location to communicate with a level of service associated with a threshold level determination of received signals, such teachings are cumulative to what is already disclosed by Reddy. Accordingly, in view of the above analysis of the disclosure of the Reddy reference, we find that, contrary to Appellants' arguments that Reddy does not make up for the deficiencies of Crosbie and the admitted prior art in disclosing the features of independent claims 1, 9, 18, 26, and 32, all of the requirements of those claims are in fact present in the disclosure of Reddy. Further, we find that the teachings of Crosbie and the admitted prior art supplement Reddy's

teachings to establish the Examiner's prima facie case for the claims being obvious over the combination of those references.

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that Appellants have not shown that the Examiner erred in rejecting appealed claims 1-39 for obviousness under 35 U.S.C. § 103.

DECISION

The Examiner's 35 U.S.C. § 103 rejection of claims 1-39, all of the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

KIS

Avaya
DEMONT & BREYER, LLC
100 COMMONS WAY, STE 250
HOLMDEL NJ 07733